No. 2524

United States Circuit Court of Appeals

For the Ninth Circuit

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a Bondholders Committee, W. J. FERRIS, as Receiver of IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY, Appellees.

A. W. PRIEST, W. D. WILLARD, WM. H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and CHARLES M. SMITH, Interveners, and Being a Protective Committee for the Holders of the First and Refunding Bonds of the IDAHO-OREGON LIGHT & POWER COMPANY, Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY, Cross-Appellees.

Reply Brief of Appellees and Cross-Appellants A. W. Priest, *et al*, Bondholders Protective Committee, to Brief of *Amicus Curiae.*

Upon Appeal From the United States District Court for the District of Idaho, Southern Division.

JOSEPH CUMMINS, Chicago, Illinois
RICHARDS & HAGA, Boise, Idaho,
Solicitors for A. W. Priest, et al.

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Reply Brief of Appellees and Cross-Appellants A. W. Priest, *et al,* Bondholders Protective Committee, to Brief of *Amicus Curiae.*

Upon Appeal From the United States District Court for the District of Idaho, Southern Division.

The brief filed by *amicus curiae*, on the day of the hearing, is a bitterly partisan argument on behalf of the Railway Syndicate, who were named and described in the Bill in Intervention of the bondholders committee but who declined to submit themselves to the jurisdiction of the court and take the burden and responsibility of parties to the cause, or to join issue with the injured bondholders on the wrongs complained of in the Bill. The severe criti-

cism of the trial court, and the charges of prejudice and lack of judicial fairness are extraordinary to say the least.

The judicial character and attitude of the Judge sitting in the District of Idaho needs no defense from us, either in this court or elsewhere, but the animus of the *amicus curiae* seems peculiarly unfitting in view of the fact that, by a strict interpretation of the scope of the original foreclosure suit, his clients were relieved from defending against charges of fraud except so far as they were strictly and necessarily related to the manner of obtaining the 718 bonds, and in view of the further fact that their corporate agent, the Railway Company, was given the benefit of a most generous application of equitable principles in allowing it a preference over the bondholders for the money it had paid out in course of the perpetration of the fraud of which the Court found it guilty.

The brief is a curious mixture of appeals for strict and literal interpretation of an alleged contractual limitation on the rights of the bondholders without regard to its inequitable and fraudulent results, and with equally urgent appeals for subrogation and the most extreme extension of equitable theories, misapplied, where he desires his clients to be permitted to wholly abandon their contract and receive the mercy, yes more, the gratuity of the court.

In the introduction there is a broad general charge that the counsel for the intervenors make "unfounded

assertions with respect to the evidence in the record." This is a charge which it is very easy to make but which is not resorted to in such general terms by responsible counsel accustomed to placing high value upon obtaining and justifying the confidence of the court. We recall no specifications in the brief that in any way support this charge and we believe the charge itself to be wholly without justification and to be made loosely and without due regard for the veracity of statement that courts have a right to expect from members of the bar.

In replying, we will follow the numerical arrangement of parts employed in the brief replied to.

I.

THE NATURE OF THE ISSUE.

The matter discussed by counsel for the Railway Syndicate under this head can only have one interpretation—that it seeks to repudiate the agreement made by all parties concerned and their solicitors with each other and with the Trial Court and set forth in the decree: to-wit, that the "*decree shall be regarded so far as such fact may be at any time material as having been made after sale and upon distribution and as upon an application of said Railway Company as a bondholder to share in such distribution and as against objection by these intervening bondholders.*" (Trans. 163). Notwithstanding this agreement of all parties with each other and with the Court, made and requested in good faith by all parties to the cause, the *amicus curiae*, avow-

edly representing parties *not before the court,* says (p. 4) that the issues "did not present the question of the rights of the Railway Company upon distribution and accordingly * * * the rights of the Railway Company upon distribution should not be curtailed." His attitude and position in this matter is a fair sample of his attitude toward the Trial Court and toward the questions of fact and law that properly arise upon the record before the Court.

II.

The caption of this section is "The Assumed Insolvency of the Idaho-Oregon Light and Power Company Was Not a Fact."

We have always supposed that the function of a friend of the court was to aid the court by discussing propositions of law and not to make an argument upon the facts in the record, to say nothing of disputing the facts found by the Trial Court, or impeaching or contesting the record or the facts not questioned by the parties to the record.

The suggestion that the Idaho-Oregon Company was not insolvent in the fall of 1912 was made for the first time upon the oral argument in the Court of Appeals. It was never heard of in the Trial Court. It is true, as counsel asserts, that the Bill in Intervention does not in so many words allege the insolvency of the Power Company on September 25, 1912. It must be remembered that at the time the bill was filed the facts with reference to the Power Company,

and in a still larger degree the facts with reference to the Railway Company were a closed book to the intervenors. It is fairly inferable from the Bill that at the time it was filed in the summer of 1913, the intervenors believed that it was the duty of the Railway Company, as practically the sole stockholder of the Idaho-Oregon and holding its second mortgage bonds to the amount of nearly a million and a half dollars, to maintain the Idaho-Oregon as a going concern, postponing if necessary the payment of interest to themselves on their second mortgage bonds until they should have completed the Ox Bow, and until the development of the country had made it a stable and self sustaining enterprise. Their feeling and opinion in that regard in no way militates against the fact that the proofs in the course of taking depositions over a period of several months showed conclusively that the Idaho-Oregon was insolvent on September 25 and that the insolvency peculiarly fitted the definition which the *amicus curiae* selects for the purpose of argument, namely "in the sense that" the directors "knew that its business could not be continued and understood that it would not be." Counsel complains that the issue was not presented by the Bill and that the Railway Company therefore had not been afforded an opportunity to show affirmatively that it did not consider the Power Company insolvent in September or December, 1912. There is a striking lack of candor and consistency about this statement. The *amicus curiae* was present throughout the trial in the Dis-

t.ict Court, and participated therein. He knows that the efforts of the Railway's counsel including himself were directed to showing that the Idaho-Oregon was in a desperate financial condition in September, 1912. Any lack of insistence upon this in the record by the intervenors is fully accounted for by the fact that it was at no time disputed by their opponents but constantly and consistently admitted.

We dispute the right of the *amicus curiae*, heard by grace of the parties and of this court, to repudiate the admitted position of the appellant and set up a theory of his own upon a question of fact. Why should appellees be required to argue this question in this Court? We contend that at this time and place, upon the record, and upon the brief of the only accredited counsel of the Railway Company, it is not arguable or disputable. We respectfully refer to the Railway Company's brief and quote: (p. 114) "The Company was not even approximating in earnings the interest upon its second mortgage bonds and default upon those bonds if the earnings or any cash available should be relied upon to pay this interest would fall inevitably upon November 1st, less than forty days from the date of the meeting of September 25th. In addition to these facts the company was confronted by competition in the heart of its market. The competitor had already obtained its franchises, built its line to Boise City and had completed its soliciting campaign, having signed up

contracts the number of which there was at that time no means of knowing. It had also established a new rate some forty per cent lower than the existing power rate of the Power Company."

(P. 117). "The financial condition as shown by the evidence of the interveners, was such that it could not meet its obligations and survive the 1st of November."

(P. 118). After discussing the contract of the bankers to buy an additional $140,000.00 of second mortgage bonds and suggesting that "assuming the Directors to have been entirely honorable men, they would not have called for the balance of this commitment under these conditions when it could do the company no good." * * * "We feel satisfied that no court would hold that an insolvent corporation is bound, because it has an outstanding contract to sell its securities to increase its indebtedness by completing such sale. We think therefore, that the second statement of the court that the Company had this sum available on demand is true only conditionally and with qualification."

(P. 119). "Without quoting this testimony in detail it is apparent that all the bonds sales had during the year 1912 were generally based upon the proposition that a strong financial syndicate had gotten behind the properties of the Power Company, and would take care of any situation which might arise, and buyers generally were not aware of the Company's actual condition (pp. 343-345). It

would have been a palpable and inexcusable fraud, legal and moral, upon the public, approaching if not equaling criminality, to have brought these bonds out on the credit of the syndicate without stating the actual conditions. If the conditions were truly stated, viz., that the Company could not earn the interest upon these bonds outstanding at its present rates, and that those rates on January first would have to be cut, to meet competition, at least forty per cent in addition to the loss of all business which the competitor might get, we do not think the bonds were worth fifty cents on the dollar or any other sum of money. They simply could not have been marketed."

(P. 120-121). "Turning to an affirmative argument, we submit that the Record here shows that the Power Company, particularly its stockholders, received a very valuable consideration through this transaction, namely, the maintenance of the company as a going concern until such time as its future could be considered and determined in the light of the new conditions which were to surround it. It could not pay the interest on its second mortgage bonds under the existing conditions. That had been demonstrated and consequently a reorganization was inevitable."

(P. 125). "True, if the Power Company was hopelessly insolvent as then (at the time of the Bates & Rogers transaction) seemed to be the case, its rights may not be of great importance if their protection is secured at the expense of creditors, but that

the creditors were not injured we will endeavor soon to show."

(P. 136). (Discussing equitable reimbursement to the second mortgage bondholders and their expenditures on the property) "Looked at from the standpoint of the creditor, the Railway Company, assuming the insolvency of the Power Company and the imminence of its liquidation and disregarding every consideration for the transaction involved save and except the surrender of the second mortgage bonds, we can conceive of no fairer act by a board of independent directors than the transaction here questioned consummated."

(P. 158). "Analyzed as we have endeavored to analyze them, the facts are not complicated, nor are the principles contended for difficult of expression or comprehension. The practical situation which is here presented is one by no means of rare occurrence. A company apparently prosperous, but fundamentally unsound, has conducted business for several years, but has become financially involved. An attempt is made by those in charge of its affairs to meet the situation through a readjustment of securities, and to hold it intact until such readjustment is brought about."

Upon the trial in the District Court counsel for the Railway Company consistently with the Railway Company's attitude throughout the trial and consistently with the present attitude as shown by the foregoing quotations from the Railway Company's brief, stated upon the argument that the Railway

people at the time of the first transaction involving an exchange of bonds on September 25th, 1912, had come to the conclusion that the Idaho-Oregon Company could not go on with its business and that the course then inaugurated and subsequently pursued was in pursuance of that conclusion and adopted for the purpose of protecting themselves as they had a right to do. The *amicus curiae* being present took no issue with this statement but on the contrary in his argument adopted the same position and enlarged greatly upon the proposition that the rights of the intervenors were confined to the four corners of their contract, that their contract had been complied with and that they had no legal ground of complaint no matter what the directors did with these bonds and that the Railway Company had a perfect right to appropriate them to its own advantage.

In view of these declarations by the Railway Company's counsel, why should not the Court have found what the parties admitted? And why should this friend of the Court, who is not counsel of record or representing a party to the record, consider himself at liberty to dispute a fact which no party of record disputes? Why should he be permitted to raise, as the one fundamental error of the Trial Court, a question not assigned as error by the appellants in this Court?

Counsel who appears as *amicus curiae* informs us in the opening sentence of his brief that he represents "those who have supplied approximately $6,500,000.00 to finance the investment represented

by the securities of the Idaho Railway, Light & Power Company (hereinafter called the Railway Company), including the interests of that Company in the Idaho-Oregon Light & Power Company." It would seem that it is not important here how much his clients may have invested in the Railway Company. That the securities of the Railway Company, which his clients hold, may not have attained the value which the syndicate expected, affords no reason for recouping their losses in that Company by appropriating the assets back of the first and refunding bonds of the Idaho-Oregon Company held by these interveners and numerous other small bondholders scattered over the country. As aptly said by the Trial Court, they are not "privileged to strip it of its meager remaining resources for the purpose of recouping their private losses."

The proceedings of the syndicate and of the directors operating in their behalf are contrary alike to the law of corporate management, to one's sense of common fairness, and to the fundamental principles of equity, although they may find some precedent in past operations of members of that syndicate and others operating in centers noted for schemes of high finance.

From counsel's brief it is clearly apparent that he appears in the case because he represents parties directly in interest in this proceeding; that he is in fact a partisan in the case, and only in theory an *amicus curiae*. For reasons best known to himself he has abstained from making his clients, who are so much

interested in this case, parties to the cause so that they could be bound by any decision that would be rendered. As *amicus curiae* he has no control over the suit or the condition of the record. He can only suggest matters to the Court arising upon the face of the record and the specifications of error made by appellants. He can not take exceptions to rulings to which appellants have not excepted.

> "He will be deemed not to be aggrieved if the Court declines to adopt his suggestion, whether brought to the attention of the Court by motion or in any other manner, and, hence, he can not make a valid exception to the ruling of the Court, as his friendly offices, conceding them to be disinterested, are at an end when he has informed the Court."
>
> Birmingham Loan Etc. Co. v. Anniston First Nat. Bank, 100 Ala. 249, 46 Am. St. Rep. 45.
>
> Campbell v. Swasey, 12 Ind. 700.
>
> 3 Enc. L. & P. 837.
>
> Parker v. State, 133 Ind. 178, 18 L. R. A. 567.

If his clients are interested in the particular case before the Court, and not in some other cause, leave to be heard as *amicus curiae* would have been denied by the Court.

In Northern Securities Co. v. United States, 191 U. S. 55, 48 L. Ed. 299, the Court says:

> "It does not appear that applicant is interested in any other case which will be affected by the

decision of this case; as the parties are represented by competent counsel, the need of assistance can not be assumed and consent has not been given.

Leave to file must, therefore, be denied."

In the case at bar counsel for interveners stipulated that counsel who now appears as *amicus curiae* might as such file a brief, but that does not enlarge his authority in the case. He is still limited to such questions as may be raised by one who appears as a friend of the Court. Neither in the specification of errors contained in the record or in the brief of appellant has the question been raised that the decision of the Trial Court that the Idaho-Oregon Company was insolvent in September, 1912, was not sustained by the record. Under the authorities and the rules of the Court this question can not be raised for the first time in this Court without it having been assigned as error by appellant; it can not be raised by one who appears only as a friend of the Court and who does not represent a party to the cause.

The argument that the Railway Company could not have intended in the fall of 1912 to permit the Idaho-Oregon to default and could not have considered it insolvent because they then loaned it $250,000.00 is seen not to possess any weight because of the fact that it took or was to take $500,000.00 of first mortgage bonds as collateral for the loan, which even in liquidation would doubtless yield that much, and obtained the enormous additional advantage of transferring to itself $718,000.00 of first mortgage

bonds, thus enabling it to share in the first mortgage security to that extent.

The policy of the Railway Company is further illustrated by the fact that it did not relinquish its hold upon the property, nor did it cease to furnish money for additions thereto even after the default and foreclosure, and why should it? It had not the slightest fear that the property would ever pass out of its control or the slightest doubt that whatever it put into the property it would ultimately retain and in addition thereto it would acquire the interest of the first mortgage bondholders by a skillfully devised plan of confiscation. It fully intended to maintain the property as a "going concern" in the sense of a continuously operating utility and to obtain and retain all the benefits that would accrue therefrom; but so far as its creditors were concerned there is and never has been any doubt of the fact, freely admitted upon the trial, that in September, 1912, the Railway Company intended that the Idaho-Oregon should default and undergo reorganization and "reorganization" in this case meant transferring the property to the owners of the Railway Company without giving anything therefor, except obligations of the Railway Company, junior or subordinate to those already held by the syndicate.

There is a perfectly consistent series of acts from September 25, 1912, down to the appointment of the Receiver in December, 1913—in fact down to this hour. They had a complete scheme for accomplishing a foreclosure of the first mortgage bonds. They

proceeded to acquire, by the exchange of seconds, as many of the first mortgage bonds as possible so that they should share in the proceeds, as well as have a voice in the foreclosure. Through a decoy "protective committee" they had no doubt they could obtain enough bonds, with the 718 already acquired, to conduct a foreclosure strictly under their own control, buying the property without competition at a nominal price, shutting out all unsecured creditors paying a trifling sum from the proceeds of foreclosure to those first mortgage bondholders who would not join them in their "reorganization" and giving those who did join a perfectly worthless second mortgage of the Railway Company junior to the mortgage which represented all of the money invested by the railway crowd in the Railway Company's properties and in the extensions and additions made to the Idaho-Oregon's properties during the period of reorganization. It was a beautiful scheme and it nearly succeeded.

III.

THE CIRCUMSTANCES WHICH JUSTIFY CREDITORS IN ASSAILING CORPORATE ACTS.

This section seems to be devoted to the proposition that creditors can only assail a transaction of directors with the property of a debtor corporation, when the transaction which was complained of was entered into with the intent to hinder, delay or defraud such creditors. We have no quarrel with the phraseology as connected with this case though the

scope of an inquiry by a court of equity into a case of fraud is hardly limited by the familiar phraseology of the attachment statutes of the various states. We suspect that counsel's experience has misled him in respect to the scope of the theory of fraud in equity as set up in this section of his argument, and we will dismiss this with two or three observations.

First, the acts of September 25 and the months following were intended to "hinder, delay and defraud" creditors.

Second, dismissing the narrow statutory theory of fraud the whole scheme was fraudulent in intent, and method, in that directors, being also directors of another company, upon a consideration that was pretended only, and in pursuance of a large scheme of fraud, oppression and dishonesty, abstracted securities from the treasury of their company and appropriated them to their own use through the other corporation which they owned. Upon foreclosure sale and distribution of the property of the company which they have thus ceased to protect they present these bonds, thus fraudulently obtained. As the trial court most justly says in its opinion (Trans. 150) "It (the Railway Company) is dependent upon and is here invoking the assistance of a court of equity to make actually available to it the fruits of its wrong-doing. Through the trustee it seeks a foreclosure of the security of the bonds and an order distributing to it a proportionate share of the proceeds of the property. It is asking the court to aid

it in enforcing contracts the possession of which it obtained in a manner violative of sound principles of public policy and of good morals, and in that view it is quite unimportant whether the intervenors would have any standing as plaintiffs in an independent suit. Regardless of who objects or whether any one objects, a court will not knowingly assist a party to reap the fruits of his wrong-doing, and under the rule the Railway Company must be denied the relief which it seeks."

The many cases cited by counsel upon this head do not, it seems to us, assist the court in the determination of the question presented here. The proposition that creditors who were not creditors at the time of the fraud have no legal standing to complain, has no application, it is not disputed and there is an express stipulation that the 2494 bonds admittedly valid and the major part of which the intervenors now hold as a bondholders committee were issued and outstanding long before any of the acts complained of were committed.

Counsel opens part three of his argument with the assertion that we have not discovered a single case holding that bondholders situated as are the intervenors have ever been accorded the right to question the acts of their corporate debtor in disposing of its property "unless by such acts their contract has been breached." If by the qualification quoted the counsel means some letter of the contract, the statement of course is not true. Fraud affecting creditors perhaps rarely attacks the letter of a creditor's contract.

It operates by destroying the benefits of his contract and not by violating the letter thereof. The cases of Jackson vs. Ludeling (88 U. S. 616) and Wabash vs. Ham (114 U. S. 585), the two cases decided by Justice Woods of Indiana, the West Virginia cases of Sweeney vs. Refining Company and innumerable others which might readily be cited are all cases where the fraud operated to take away the benefits of the contract without in any way affecting the letter thereof.

As stated upon the oral argument the case of Richardson vs. Green (133 U. S. 30) is fairly illustrative of the case at bar and perhaps a case sufficiently identical, as to its facts, to be of the greatest assistance. It is absolutely identical in that there was a foreclosure of corporate bonds secured by deed to a trustee, no defense by the principal debtor, intervention by various holders of bonds secured by that trust deed and a denial by certain of the bondholders of the right of Richardson as the holder of other bonds to share because his bonds were obtained by fraud. Counsel apparently seeks to convey the impression to this court that the 1105 bonds referred to by us were held by Richardson as Treasurer, though he skillfully involves the statement with matters respecting other bonds and does not say categorically that they were. The 1105 bonds were not held by him as Treasurer but as security for a substantial sum of money actually advanced, in recovering the bonds from another person, and to prevent their sacrifice by that other person. He obtained

judgment for this money, levied on the bonds and bought them in. The court found that in so doing he had taken advantage of his position and, because of his relations and the advantage thus taken of other bondholders, his act was fraudulent and he was not permitted even to recover the money he had paid out in connection therewith. The case at bar seems to us a much more flagrant case of deliberately planned fraud and wrong-doing than the Richardson case. Richardson may have, and probably did act in the first place, at the time he paid out his money, in good faith, while here the acts of September 25 and following were all a part of a deliberately preconceived and elaborate scheme of fraud and oppression.

IV.

FRAUD WHICH ENTITLES CREDITORS TO ASSAIL.

Sixty pages of a closely printed brief are devoted to an inquiry as to what fraud entitles creditors to assail corporate acts, and an attempt is made to demonstrate that no such fraud is shown in the case at bar. It seems unnecessary to follow counsel through the various steps of his extremely technical argument. It seems to be conceded by counsel that the intervenors are, for the purpose of this suit, in the position of judgment creditors, therefore all inquiries as to the status of creditors whose claims are not reduced to judgment is aside from the question. It is clear also that these intervenors have a first

right in or lien upon the property through their mortgage. If it were necessary that actual intent to defraud these creditors should be shown it is amply established by this record.

The cases cited by counsel where a director or officer has been permitted to retain a preference because of security voted or given to himself, have little if any bearing on the question before the Court in this case. Never has a court of equity allowed directors and officers of a corporation to reap the benefit of deep-laid schemes to defraud innocent bondholders whose property the offending parties were for the time managing or manipulating through the ownership of watered stock representing no value but carrying with it the control of property built and acquired wholly from the bondholders' money.

The cases where preferences have been allowed to stand showed honest attempts to protect other creditors and keep the concern going, whereas in the case at bar the transactions which the Trial Court set aside were clearly shown to be fraudulent devices and schemes for defrauding the other bondholders for the exclusive benefit of the persons who devised and carried out the schemes and transactions involved.

The Railway Syndicate acquired control of the Idaho-Oregon properties through the ownership by the Railway Company of about 80 per cent of its worthless capital stock—stock that had no real value and represented no property, but nevertheless gave to the owner the absolute control of the property.

This stock control served well the purposes of the Railway Syndicate, for through the holding of such stock they could operate and control the Idaho-Oregon Company, manipulate and dictate its policies. The directors and officers of the Railway Company were made the directors and officers of the Power Company, and as the investments of these officers and of the Railway Syndicate were directly evidenced by the stocks and bonds of the Railway Company it was to their interest to vest in the latter company absolutely all the properties of the Power Company and, if possible, free and clear of its outstanding bonds. They promptly set about, therefore, to build up the Railway Company, to transfer to the latter the large consumers of power such as the traction companies, and to enlarge and fully equip the Swan Falls plant of the Railway Company, leaving the Ox Bow plant of the Power Company in an incompleted state. Having completely, as they believed, circumscribed the business and operations of the Power Company by the properties and system of the Railway Company so that the former was merely a pawn in the hands of the Railway Company, there remained only the foreclosure of the first and refunding mortgage bonds of the Power Company, and upon the sale of the property under such foreclosure there could be but one bidder, viz.: the Railway Company. It could acquire the properties of the Power Company at its own price, for by the time of the sale it was believed that the Power Company would be so completely linked with the Railway Company that no

independent interests could afford to even consider bidding on the property.

To avoid paying out as little cash as possible at the sale and to share in the meager proceeds from that sale the Railway Syndicate conceived the scheme of exchanging the second mortgage bonds which they held for first mortgage bonds. Through the ownership of a large amount of first mortgage bonds they would have a voice in the foreclosure, and through a decoy "Protective Committee" they expected to secure the deposit of enough additional bonds to give them absolute control over the trustee in conducting the foreclosure.

That this committee acted solely in the interest of the Railway Syndicate and the motives and purposes that actuated the transactions under review in this case, appear from a circular which they sent out to the first mortgage bondholders of the Power Company five days before default actually occurred, but sent out early for the purpose of forestalling the organization of any committee by the bondholders themselves (Exhibit "B," Trans. pp. 80-89). This circular sets forth the large interests of the Railway Company in the Power Company, showing its stock ownership, as well as its ownership of the 718 bonds and other interests, and the committee say in this circular: "Manifestly, therefore, both on account of its large holdings of the securities of the Oregon Company and because of its *dominant position* as the owner of very large consumers of power in the territory served by the Oregon Company, the

co-operation of the Railway Company will be essential to the success of any plan for the readjustment of the finances of the Oregon Company. Indeed, without the assistance of the Railway Company, it is difficult to perceive how any readjustment could be brought about except through the slow process of a receivership. By reason of the foregoing, the committee has taken up the matter with the Railway Company, and after careful consideration of the entire situation, is able to report that it has arranged with the Railway Company to consent to a readjustment of the relations of the two companies and of the obligations of the Oregon Company, upon the following basis:"

They set forth a scheme of reorganization which has for its sole purpose the giving of an inferior subordinate debenture or bond to the first mortgage bondholders of the Power Company, and the railway bonds, held by the Railway Syndicate are to be made a first lien upon all the properties of the Power Company. To any one at all familiar with the facts and the true situation as it existed, the proposed scheme was so glaringly fraudulent that it would not have received a moment's consideration, but the innocent and small bondholders scattered from the Atlantic to the Pacific, unfamiliar with the property, having no information concerning it except what they received from the Power Company and its officers (who were the agents and nominees of the Railway Syndicate and who were acting in the interests of that Syndicate), were expected to, and in most cases

did, consider the situation hopeless. What little information they could receive about their securities was limited to what the Railway Syndicate thought it wise to give them consistent with the proposed scheme of reorganization.

The small and hopeless bondholders, not knowing that this pretended "protective committee" was acting wholly in the interest of the Railway Company, entrusted it with their bonds to use in the reorganization as the committee thought best. Apparently for fear that the true facts would soon come to light and their plan exposed, the committee hastened to file the foreclosure suit at the earliest time permitted under the terms of the trust deed. The bill was filed on July 7th. The subpoena was made returnable on August 11th and in the meantime the defendants in the case, acting under the direction of the Railway Syndicate, filed *pro forma* answers raising no issues and stipulated for taking depositions, and such depositions were taken so that on the return day of the subpoena, viz.: August 11th, the cause was ready for submission to the Court for final decree; and within a month thereafter the property would have been sold and bid in by the Railway Company at its own figure.

The argument of counsel that the fact that the Railway Company advanced money to keep the Power Company going shows that it did not believe the Power Company to be insolvent, means nothing. It will not be denied that these advances continued during the foreclosure and after the foreclosure,

practically until the receivership. The true motive and reason for doing so was the fact that the Railway Company expected to bid in the property at its own figure for it was manifestly impossible for any outside or independent interest to get information as to the earnings or income of the property or any facts as to its operating history or the value of the estate, except through the officers of the Railway Company. Hence, it was immaterial when the repairs or improvements were made. This also clearly appears from the interviews of counsel for the Power Company and its general manager given out at the time this suit to foreclose was filed (Trans. pp. 51-54).

The Trial Court had all these facts before it. It had an intimate knowledge of the entire situation because of the various phases of this controversy that had come before it. It had the true measure of the Railway Syndicate and the purposes and motives that actuated the directors in the transactions under consideration here. The facts were so apparent and so well known to the distinguished Judge who presides over that Court that no argument, however extended or however technical or plausible, could convince that Court that the transactions involved were honest efforts to protect the Power Company and its creditors. It was too apparent that the transactions were made for the purpose of benefiting the Railway Syndicate and to accomplish a transfer of the properties of the Power Company to the Railway Company and for the purpose of taking an unfair

advantage of the bondholders of the Power Company.

When a situation is such that it causes the calm, deliberate and distinguished Judge who presides over the Trial Court to characterize the transactions here involved in the positive and strong language that we find in the opinion in this case, it may be safely assumed that the facts were extraordinary, to say the least. The Court could not do otherwise than it did. It well said: "Regardless of who objects or whether any one objects, a court will not knowingly assist a party to reap the fruits of his wrong-doing, and under the rule the Railway Company must be denied the relief which it seeks." (Tr. 151).

Much space under this section is devoted by the *amicus curiae* to a discussion of the trust fund theory and it is alleged that the doctrine is inapplicable except in cases of *confessed* insolvency. This proposition we submit finds no support in the adjudicated cases. Much reliance is placed upon the case of Hollins vs. Briarfield Coal and Iron Company, 150 U. S. 371, and alleged quotations are made from the opinion of the court in that case. The friend of the court seems to have been unfortunate in the selection of a clerk to copy the extracts from the opinion. The first quotation begins near the bottom of page 385 (p. 1117 Vol. 37 L. Ed.) and as found in the Law Edition reads as follows (The part in italics is the part intended to be quoted):

"The officers of a corporation act in a fiduciary

capacity in respect to its property in their hands and may be called to account for fraud or sometimes even mere mis-management in respect thereto; but as between itself and its creditors, the corporation is simply a debtor and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor. This is certainly the general rule, and if there be any exceptions thereto, they are not presented by any of the facts in this case. *Neither the insolvency nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions nor all together gave to these simple contract creditors any lien upon the property of the corporation nor charged any direct trust thereon.*"

As quoted in counsel's brief, the language is changed from a specific statement applied *directly* and *exclusively* to the case there before the Court, into a statement of a general proposition. It is apparent that the court had in mind the particular facts of the case which were that there was a mortgage outstanding creating a prior lien upon the property of the company, that foreclosure of this mortgage had been instituted before these simple contract creditors began their action, that they were found by the court to have carefully avoided the foreclosure proceedings where they would have been relegated to their proper rank as junior to the mortgage and were seeking by an independent suit to get an independent receivership and an independent sale

of the property, antagonistic and superior to the lien of the mortgage. Certainly the court states only a patent fact in saying these simple contract creditors had not, by the insolvency and the fraud, obtained a lien in the sense that the mortgagee had one, nor superior to the lien of the mortgage.

There is a similar infirmity in the next quotation from the Hollins case. It is taken from page 383 of the official reports and from page 116 of the Lawyers' Edition. It is quoted as though it were a continuous and connected expression of the court, whereas there is, in the opinion, intervening matter, and, again the form of expression is different from that reported in the Lawyers' Edition of the reports.

The Hollins case in no wise attacks the principles of the trust doctrine, and the application thereof to the facts in that case is entirely consistent with the very different application in other cases where both the Supreme and Inferior Federal Courts have held a trust to exist in favor of creditors. In the Hollins case the plaintiffs were unsecured creditors having claims contracted four or five years after the execution of the trust deed and the execution of the bonds. After a suit had been begun to foreclose the trust deed, these creditors filed an independent suit in the same court alleging that the conveyance to the trustee was fraudulent that a large amount was still due on the stock, and asked to have a receiver appointed and the property sold in the satisfaction of their unsecured claims. They allege the pendency of the foreclosure suit but did not seek to intervene therein.

After a decree and sale in the foreclosure suit, a final decree was entered dismissing the suit of the unsecured creditors and the appeal was prosecuted from that order. Justice Brewer in delivering the opinion said:

> "Doubtless in such foreclosure suit the simple contract creditor can intervene, and if he has any equities in respect to the property, whether prior or subsequent to that of the plaintiff, can secure their determination and protection; and where, by the express language of the bill filed by the trustee, all claimants and creditors were invited to present their claims and have them adjudicated. These plaintiffs did not intervene, though as shown by the allegations of their bill they knew of the existence of the foreclosure suit; neither did they apply for a consolidation of the two suits. On the contrary the whole scope of their suit was adverse to that brought by the trustee and in antagonism to the rights claimed by him. They intended to keep away from that suit, and intended to maintain, if possible, an independent proceeding to have the property of the debtor applied to the satisfaction of their claims. But this as has been decided in the cases cited, cannot be done."

The Hollins case was principally relied upon in the case of Sutton Manufacturing Co. vs. Hutchinson, 63 Fed. 496, which was decided in the Circuit Court of Appeals for the Seventh Circuit, by Justice Harlan, and Judges Jenkins and Bunn, Justice Har-

lan delivering the opinion. The case was decided in the Circuit Court upon the authority of Lippincott vs. Carriage Company, 25 Fed. 577, and Howe vs. Tool Company, 44 Fed. 231, the cases by Judge Woods heretofore cited in a decree setting aside a mortgage and the Circuit Court of Appeals declared in the opinion that there was no error in the decree. After referring to Curran vs. State, 15 Howard 304, Drury vs. Cross, 7 Wallace 299, Graham vs. Railroad Co. 102 U. S. 148, Railway Company vs. Ham, 114 U. S. 587, Koehler vs. Iron Company, 2 Black 715, and Richardson vs. Green, 133 U. S. 43, and citing from those cases in support of the doctrine that when a corporation is insolvent or its managers have ceased to intend to continue its business or pay its debts, the assets of the corporation become a trust fund for its creditors. Justice Harlan says (page 500):

> "There is nothing in Hollins vs. Iron Company (150 U. S. 371, 382) to which appellant calls attention that is at all inconsistent with these principles. On the contrary the court, while reaffirming the doctrine that the property of a private corporation is not burdened with any specific lien or trust in favor of general creditors, observed that such a corporation when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exists in favor of the creditors of a partnership after becoming insolvent, and in each case such lien and trust will be enforced by a court of equity in favor of creditors.

> "It is, we think, the result of the cases that when a private corporation is dissolved or becomes insolvent or determines to discontinue the prosecuting of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technically trustees they hold, in respect to the property under control, a fiduciary relation to creditors."

There is, of course, no contention here that the property of a corporation is affected by a specific trust in favor of creditors so that the corporation and its managers may not deal with the property in good faith in the usual course of business while it is solvent and proposing to maintain itself and pay all of its obligations justly incurred. But the doctrine is too generally and clearly established in the decisions of the Federal Courts to be longer matter of contention that when a corporation has become insolvent or when it no longer intends to go on with its business and pay all of its obligations, but having abandoned that intention, begins to make special disposition of its property to the advantage of certain creditors, its assets become charged with a trust in the hands of its officers and directors for all of its creditors as their priorities then exist. Peculiarly and emphatically is this the case when it begins to make such special disposition for the benefit of its

directors and officers. This is the state of the facts here and upon this state of facts the application of the principles is so clear and legally unimpeachable as to leave no ground for reasonable doubt.

Validity of the acts by which the 718 bonds were obtained is asserted (p. 43) upon the ground that the transactions had been fully executed and that neither the corporation nor its stockholders had complained. This reasoning does not differ from earlier reasoning of the same counsel that only the corporation or its stockholders can avoid or attack the validity of the transaction. The "execution" of the contract and its ratification by acquiescence of this completely subservient corporation, having no independent directors, and having to all intents and purposes only one stockholder—the one benefited by the fraudulent acts—can have no effect upon the rights of the creditors who are the ultimate sufferers from the fraud.

The peculiar point of view of the friend of the court with reference to frauds upon creditors is illustrated by the solemn statement (p. 44) that "as both stockholders and creditors if they so desired, they were entirely within their rights in seeking to better their position."

An attempt is made by review and discussion of the record to explain and justify the acts of September 25 and December 27th, 1912, and passing reference will be made to some of the arguments advanced.

It is suggested for example (p. 50-51) that the

loan of $250,000.00 is inconsistent with the view that the directors did not intend to keep the Idaho-Oregon going; that some much easier and simpler device could have been found that would have taken less money and would have been equally effective in sequestering the first mortgage bonds which they desired to seize. The answer to this is that their plans did not intend an abandonment of the property to be sold to a stranger for whatever it might bring. They had not the slightest intention of losing their hold on the property for a moment. What they intended was that without losing such hold and with the least possible damage to the business and good will and value generally of the estate, they would clean out the unsecured creditors completely, put through a rigged reorganization in which the holders of the senior securities of the Power Company should become junior and that otherwise everything should sail along smoothly. There is a most essential difference between an intention to maintain a company as a going concern, paying all of its creditors in the course of business as their priorities appear, and keeping it a going concern in the sense of its physical operation and the maintenance of its business while defrauding and eliminating its creditors by devices to which modern corporate organization and interrelations lend themselves.

The *amicus curiae* will probably not object to our going outside the record to state that the Railway Company did even more than loan $250,000.00 in the fall of 1912. It loaned other sums in the spring

of 1913 and even furnished property and paid for labor to the value of more than $50,000.00 in adding to the Idaho-Oregon plant *after the default on April 1st*, 1913, *and in part after the foreclosure suit was in full swing.* Are these later advances to be taken as evidence that the company was not insolvent and that its directors and officers still intended to maintain it as a going concern, meeting its obligations? The Railway Company had a hold upon the property of the Power Company which it considered unshakable in view of the fact that the only persons to be fleeced were about 600 small bondholders holding mostly from one to five thousand dollars each, and scattered from Maine to California. That the confidence of the Railway Company in its ability to handle the situation and completely carry out the scheme was well founded is shown by the fact that it got into its control, through the decoy "protective committee," more than 80 per cent of the first mortgage bonds and had everything but the final step in the plan accomplished before these intervenors got into the situation and saved the unsuspecting and innocent bondholders from being sold out by and for the benefit of the Railway Syndicate.

Counsel is in error (p. 51) in the statement that the notes given for the $250,000.00 gave the Power Company a year of credit. He omits a most important element of the collateral agreement under which the money was paid out. (Tr. 118) "The principal of this note shall become due and payable

"a. Upon default being made in the due and

punctual payment of any installment of interest thereon; or

"b. Upon default being made in the due and punctual payment of any installment of interest upon any of the Idaho-Oregon Light & Power Company's bonds; or

"c. Upon any Court proceedings being instituted against Idaho-Oregon Light & Power Company for the purpose of appointing a receiver or otherwise sequestrating its assets for the benefit of its creditors."

By these provisions the very plan which the Railway Company was then pursuing would make the $250,000.00 due whenever the Railway Company chose to do or permit to be done any of the three things enumerated.

It is further declared (p. 54) that after the adoption on September 25th of the first resolution authorizing the transaction, there was at the same meeting another resolution unanimously adopted authorizing the execution of the papers to carry it into effect. If this court has the record of September 25th in mind, it will recall that the complete minutes of the whole meeting had been prepared in advance by the Company's New York attorney, including even the way in which the members of the Board were to vote, that the record as to the first resolution pretending to authorize the scheme is false, that the only validity that the rest of the record possesses rests upon the fact that after the first resolution authorizing the deal had been put through, there was no evidence

that further objection was made to the previously prepared record perfunctorily carrying out the subsequent steps. We submit that this part of the record scarcely possesses the importance counsel seeks to attribute to it under the circumstances that fully appear.

All attempts to make this fundamentally dishonest and fraudulent transaction of September 25th appear in other than its true light must fail. No dispassionate view can be taken of it without coming to the conclusion declared by the learned trial court after having had these matters before him in a multitude of phases for more than a year.

> *"That under the circumstances such an agreement was thought by anyone to be in the interests of the Power Company is wholly incredible. I cannot believe that an independent Board of Directors would have given to it a moment's consideration."*

The transaction which was hung upon the settlement with Bates and Rogers is even more transparent and unmistakable in its true character. It is undisputed in the record that Rogers told William Mainland in substance that he would take first mortgage bonds at their regular market price; but that he would not take seconds; that when this was suggested to Fuller, Fuller refused to give him first mortgage bonds but insisted upon giving him seconds accompanied by the Railway guaranty. Why should the Railway have been so eager to obligate

itself unnecessarily for $20,000.00 of the Idaho-Oregon obligations? The explanation is at hand. They hung upon it an agreement for a further exchange by which to obtain $500,000.00 more of first mortgage bonds for the Railway. The *amicus curiae* argues that the transaction could not have been a deliberate fraud upon the part of the Railway because Mr. Mainland who was not one of the bankers or a member of the syndicate signed the contract. In the first place, while it is true that Mr. Mainland was not one of the bankers, he was the President of the Railway Company, had exchanged all of his Idaho-Oregon stock for Railway stock and his sole stake in the combined properties was represented by the Railway stock. In the second place he testifies that he never knew, until a few days before the taking of his deposition in the spring of 1914, that there had been a second exchange authorized. This is not so difficult to reconcile with the fact that he signed this contract to that effect, as it might appear. It is evident that he had very little to say about the affairs of the Company. Fuller and his "managing director" Watson had entirely superseded the President as the Chief Executive of the Company and reduced him to the position of a rubber stamp.

The amount of bonds named was the same as in the first contract. It is not a violent presumption that he had gotten to where he signed whatever was presented to him by the New York counsel with little more than casual explanation and it would have been very easy for him to have supposed, especially

if the parties handling the matter were willing that such should be the case, that it was a confirmation and further consideration of the exchange already authorized.

The Trial Court reached the inevitable and only conclusion possible. It says:

> *"From the testimony and the surrounding circumstances no doubt is left in my mind that the Power Company could have made settlement directly with Bates and Rogers with its first mortgage bonds at a comparatively small discount, and that the devious course was adopted not upon their demand or for the interest of the Power Company, or because of any necessity therefor, but for the sole purpose of furnishing a pretext for getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway Company, and for the interest alone of those by whom the latter company was dominated."* (Trans. 144).

A reference is made (p. 60) to the balance sheet of the Railway Company for the purpose of showing that the conclusion of the trial court that the Railway Company was also insolvent was unfounded. This court should not be misled by enormous figures in these balance sheets. The stock of the Railway which was outstanding to the amount of about sixteen million dollars represented *nothing* and it is off-set in these balance sheets by wholly fictitious figures under property, plant and equipment and by

putting in the par value of securities owned, which consisted for the most part of Idaho-Oregon stock for which not a penny had been paid, but which, as appears from the record, was received as a bonus with the second mortgage bonds.

Counsel takes exception to that part of the Trial Court's opinion which calls the Directors of the Power Company by their true names. We do not see how this can constitute reversible error. Had counsel made his suggestion in the Trial Court at the time of the argument and there requested protection in this regard, it may be that that Court would have found a way of referring to these directors by assumed names so as not to embarrass them in their future operations. The fact remains, however, that until the financial ruin of the Power Company had been decided upon the Syndicate had employed to its full advantage the advertising value of the names of these directors and their connection with large financial institutions in New York. The record shows that this advertising was not without its affect on the sale of securities of the Power Company, and was used to the advantage of the Syndicate or the Syndicate managers by Kissel, Kinnicutt & Company in the very interesting operations which they conducted with Beierlein & Reynolds, Chicago brokers, in purchasing and selling upon an advancing market the bonds of the Idaho-Oregon Company. (See particularly the circular of February 9, 1912, Trans. pp. 360-362).

The directors of the companies seemed very willing

to have their financial connections advertised when it would result to the Syndicate's advantage, and the Trial Court no doubt did not consider that it was unfair to them or to the public to set forth in a judicial opinion the real facts as to their operations, or that there was any impropriety in so doing; and we respectfully submit that sound public policy by no means forbid reference to the directors of a Company by their true names in discussing transactions like those here before the Court.

Counsel discusses (p. 82) the fact of competition in the Power Company's field and apparently desires the Court to understand that this situation arose between December, 1912, and April first, 1913, the latter being the date of the default in the payment of interest on the first mortgage bonds. The record shows that the actual competition—that is the service of current to customers by the competing company began in December, 1912, or about the first of January, 1913. Counsel cannot expect this Court to assume or believe that nothing was known about the competition until the serving of current began. This question was not presented as a material or issuable fact at the trial but since use is being made of it, the Court will take judicial cognizance that a long time is required to construct a power plant, 100 miles of transmission line, and a distributing system in a city like Boise, and that franchises have to be obtained and contracts made with customers before business begins. The gentlemen therefore who were

serving as directors and officers of both the Railway Company and the Power Company were not in ignorance until January first, 1913, of the competition or of what it meant. They must have known it was coming for at least a year and there can be no doubt that the fact of this competition and the consequent reduction in the income of the Idaho-Oregon was the chief consideration moving the Railway Company to the course which it adopted. It had bought second mortgage bonds presumably believing at the time that it was going to be able to make them good. If loss and sacrifice were to be entailed by the competition it would fall first upon the stock which the Railway Company held, next upon the second mortgage bonds, practically all of which also it held. It is easily understandable that these gentlemen would not have entered upon a course of fraud and oppression directed against the first mortgage bondholders of the Idaho-Oregon without powerful considerations moving thereto, and these powerful considerations were furnished in part by the threatened loss upon their investment in Idaho-Oregon second mortgage bonds and in part by the failure of the Railway Company at the end of its first year of existence to show more than about 50 per cent of the income necessary to meet its fixed charges. But as the learned Trial Court says: "Their misfortunes in no wise enlarge their rights." The fact that they had exercised judgment almost inconceivably bad in their power and railway ventures in Idaho in no wise justified this fraudulent and unconscionable effort to

unload their losses upon the Idaho-Oregon first mortgage bondholders.

The point is made of the fact that the appointment of a receiver for the Idaho-Oregon was primarily at the instance of the intervenors. That charge we gladly admit, but the absence of a receiver was not interfering at all with the foreclosure at the instance of the Railway Company of the Idaho-Oregon first mortgage bonds which was proceeding merrily without a receiver (the Railway itself being the "receiver"), with the Railway Company in full possession and control of the property, receiving and disposing of its revenues as it saw fit and effectually preventing any outsider or the bondholders themselves from finding out anything about the property, or taking any of the preliminary steps that would be necessary if considering its purchase. The foreclosure of a general mortgage upon all the property of a public utility company without a receiver to take possession, operate and conserve the property during the foreclosure is a most extraordinary proceeding and one, it is safe to say, rarely attempted. Everything possible was done to lull the District Court into a feeling of security and into believing that it was a wholly "friendly" proceeding, conducted by great and good people for the benefit of all concerned. Upon the filing of the Bill to foreclose the counsel of the Railway Company and the Idaho-Oregon gave an interview to the press (Trans. 51) declaring that the foreclosure was "a formal step in the reorganization of the Idaho-Oregon Company"

that the provisions of the mortgage to the State Bank were not sufficiently elastic and it was necessary to liquidate that mortgage in order to put the Company in position to raise funds to meet demands for expansion and development of the property; that the Idaho-Oregon was to be merged into the Railway and that the consolidation "*has always been anticipated since the formation of the Idaho Railway Company in the latter part of* 1911, *but has been delayed pending the consummation of an agreement between stockholders and bondholders of the two companies as to a plan of reorganization which has now been attained.*"

The same assertions were frequently made in the early part of the proceedings when these intervenors were endeavoring to get a hearing before their property should have forever disappeared into the pocket carefully prepared to receive it.

Several pages are devoted by the *amicus curiae* (84-89) to a discussion of the plan of reorganization presented by the Railway Company and to showing that it was a beneficent plan which should have been entirely satisfactory to the Idaho-Oregon first mortgage bondholders. We will not follow this discussion in detail but call attention to the one outstanding fact about this plan and to one or two incidental matters.

The Idaho-Oregon first mortgage bondholders had a first lien upon a very large amount of property and upon the rest of the Idaho-Oregon property sub-

ject to some small underlying divisional mortgages. Under any and all circumstances they had a substantial and indefeasible security. The property earned in 1912 something like $215,000.00 net according to the methods of accounting maintained by the Railway Company itself. That was $35,000.00 in excess of the amount required to pay the interest on the underlying divisional bonds and all the first mortgage bonds bona fide outstanding (excluding the 718 bonds which were not taken out by the Railway Company until 1913). By the proposed plan of the Railway Company the property was divested of the lien of this first mortgage and was subjected to the lien of the Railway Company under which $30,000,000 of bonds could be issued and under which six and one-half millions were actually issued and outstanding and the holders of this Idaho-Oregon first mortgage were put junior to the Railway mortgage. Note in this connection the fact that the Railway property itself, separate from the Idaho-Oregon property, was subject to nearly a million and a half of underlying bonds besides the six and a half million Railway firsts and was yielding only approximately 50 per cent of the income needed for its fixed charges. One vital and indisputable thing stands out and that is that the effect of this transaction was to sequester all of this $215,000.00 of net income of the Idaho-Oregon and apply it first to the payment of interest on the Railway bonds held by this Syndicate.

Manifestly if a consolidation, as stated in the interview above quoted, was the purpose of the pro-

ceedings, the consolidation should have taken place upon the basis of the fair relative value of the properties and equities held by the two concerns and inasmuch as here there were no parties dealing at arms length, but a single body of men acting as directors for both companies, if it was desirable that there should be a legal consolidation into one corporation, the highest duty was imposed upon these directors to conduct it fairly and with scrupulous regard for the interests of security holders of the Idaho-Oregon not represented or able to act for themselves. Furthermore the holders of existing securities should have had in the contemplated company the same relative positions as to liens and priorities that they held in the separate companies. First mortgage bondholders in both should have had first mortgage bonds in the consolidated company in proportion to the value of the clear property upon which their liens rested and the value of the equities where they were subject to underlying bonds. Something approximating that arrangement is all that the first mortgage bondholders of the Idaho-Oregon ever desired or sought. But an arrangement which took their property bodily and handed it to another set of bondholders of another company and took $215,000.00 of income and delivered it bodily to pay the interest to that other set of bondholders, was so outrageous, oppressive and intolerable, and the result (as they found out upon an investigation of the condition of the Railway Company) so unquestionably disastrous, that no pos-

sible course was open to them except one of resistance.

An incidental matter to which we wish to refer in this plan is the peculiar language of a certain paragraph of the Railway plan (Trans. 86). It seeks to give the impression that the new Railway second mortgage bonds offered to the Idaho-Oregon first mortgage bondholders was subject only to four and one-half millions of Railway firsts and to underlying bonds, bringing the total up to $6,491,000.00; but the Railway mortgage, as above stated, was an open mortgage under which issues to $30,000,000.00 were authorized. Note the language in the middle of page 86 of the Transcript. "The adjustment mortgage 5 per cent bonds will be a lien upon all of the properties mentioned, and *when issued* will be subject only to the following." That is to say, at the time of the issuing of the new first mortgage bonds to the Idaho-Oregon people there would be outstanding only this $6,491,000.00; but the impression attempted to be conveyed was most misleading, for immediately thereafter the parties in control could issue any additional amount under the first mortgage and increase the amount outstanding indefinitely up to $30,000,000.00.

V.

THE RIGHTS OF THE INTERVENORS ARE CONFINED TO THEIR CONTRACT, WHICH HAS NOT BEEN VIOLATED.

This branch of the argument of the *amicus curiae* is devoted to the proposition that the rights of the intervenors are confined to their contract and that this contract has not been violated. We cannot avoid expressing surprise that this proposition has been urged so vigorously and with such confidence, both at the trial and in this Court because it so manifestly disregards the essential character of the defense based upon fraud. Yet it must be admitted that it is the one argument of the Railway Company which can be given some appearance of substance. If we were suing or being sued upon our contract, the fact that the contract had not been violated would of course be material and conclusively so. But an action or defense based upon fraud may not, and usually does not, involve a breach of the contract itself. The essence of fraud is that by wrongful acts the party complaining is deprived of the benefits of his contract.

Take the case of Richardson vs. Green for example. The 1105 bonds had been duly and properly certified by the trustee just as in this case. They had been taken abroad by an agent of the Company to be offered for sale, they had become involved with a debt incurred in a foreign country so they were in danger of being lost, they were recovered by Richardson who furnished the money needed therefor and

the Company gave him its note or notes for such money. Afterwards through a proceeding upon those notes Richardson obtained possession and alleged legal title to the bonds by methods which the court found to be fraudulent and he was debarred from asserting them. In all of this there was no breach of any provision of the trust deed securing the bonds nor any suggestion that they had not been legally and properly certified by the trustee.

Take the cases decided by Judge Woods in Indiana where mortgages were set aside because constituting an illegal preference to directors or to concerns in which directors were interested. There was no breach of any express contract with the creditors who were aggrieved and at whose instance the mortgages were set aside.

Suppose the case of a creditor who holds a promissory note, unsecured, which he reduces to judgment and then finds that there have been conveyances of his debtor's property which prevent him from recovering upon his execution and he seeks to have them set aside upon grounds of fraud. There has at no time been any breach of the contract contained in his note.

In short all the labored argument that the letter of our contract contained in our bonds and mortgage has not been broken leads to nothing whatever applicable to this case. We are not complaining that our contract is broken. A fraud was committed outside of and in itself not related to our contract by which we are deprived of the benefits thereof.

There is another attempt (page 93) to repudiate the agreement entered into between the parties and the court with reference to the character of the issue and the time of its presentation as related to the sale, which will not be discussed further except to say that it seems to us to reflect strongly upon the counsel attempting such repudiation. Mention should be made in this connection of the assertions of the *amicus curiae* as to who is the mover and where rests the burden of proof (p. 96). The stipulation in the decree should be conclusive on the parties and especially on the *amicus curiae.* But entirely aside from that provision of the decree the law is clear and, we believe, the decisions are uniform that where a transaction is had whereby the directors of a corporation have obtained an advantage for themselves out of the corporate property, the burden is upon them to establish to the utmost the fairness and beneficial character of the transaction under which they assert their claims. (Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673).

The argument is made, after the issue of the bona fide bonds numbering 2494, the mortgage security was largely increased and that, therefore, the intervenors have no ground of complaint if bonds are certified thereagainst and put out. This leads around in a circle to the same old ground. The bondholders would have no right to complain if the 718 bonds had been issued in good faith in the usual course of business and by a board of directors properly discharging its functions in promoting and protecting

the interest of the debtor and its creditors. There would have been no ground of complaint in the Richardson case if the 1105 bonds had been sold as was contemplated, and probably no ground of complaint if they had been foreclosed upon by the foreign creditor under a collateral agreement and had passed into the hands of bona fide holders for value, even though the consideration might have been relatively small. These intervenors say just what every creditor deprived of his security or his remedy by fraud says when he appeals to a court of equity for relief from such fraud; that the debtor's property has been dealt with, not in the usual course of business and in good faith, but by fraudulent methods for a fraudulent purpose, whereby the creditor has been wronged and defeated.

It is not of the slightest importance that there have been additions made to the property that would justify the rightful issue of additional bonds.

Much complaint is made by the *amicus curiae* of the Trial Court upon the ground that the Court permitted himself to be affected in his conclusions by facts that arose subsequent to the matters complained of and which are in issue. There is no ground for this complaint. There is enough and more than enough in the facts directly involved to justify all the conclusions at which the court arrived but we wish to point out that the Court is not precluded in determining whether a debtor was insolvent at a given time from considering subsequent events if they are in evidence. In fact it is quite often

subsequent events chiefly from which a judgment as to insolvency at a given time can be formed. The insolvency of course must have existed at the time in question but the evidence disclosing the fact of insolvency at the time and the purpose of the officers in taking security may be composed largely of acts and events subsequent to that time.

Counsel objects in a good many places in his brief and argues extensively under this head, that after the proper issue of the bonds neither the intervenors nor any other creditor can question their disposition. There is a confusion of idea or of language or of both in the use of this word "issue." Bonds are not issued until they have been delivered to a bona fide holder for value. The certification of bonds by the trustee does not constitute "issue" of such bonds. It is an entire misuse of terms when the word issue is so employed. A bond of a company is nothing but its note, or its promise to pay. Until it has been delivered to a bona fide holder for value, it is nothing but a piece of paper, and has neither value nor potency. The certification by the trustee does not make it property nor change its essential character. The certificate of the trustee is purely for purposes of identification of the paper when it shall have been actually issued by delivery to a bona fide holder for value. There is therefore no issue until the corporation has made such delivery, and the theory that a corporation "owns" its own promises to pay that have never been delivered to any holder for value is a mere figure of speech. There was therefore no

issue of the 718 bonds until the Power Company delivered them to the Railway Company in pursuance of the fraud perpetrated, and intended to be perpetrated, upon the first mortgage bondholders.

Counsel cites the case of Bank of Toronto v. Cobourg, etc. Ry. Co., 10 Ont. 376, and says: "This case is so directly in point that we will quote from the report thereof at length, etc." From the stress laid upon this case by counsel there is no doubt but what he considers it the case most directly in point that he has so far found after an exhaustive search of all the authorities and cases on the subject.

We shall be glad, indeed, to have this Court examine that case. Nowhere has it been cited as authority or as even bearing on the subject to which it is cited by counsel. Cook on Corporations (7th Ed.) refers to the case at three different places in the text. On page 2074 it is cited as authority for the proposition that "a corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of 25 per cent." On page 2852 the same author cites it in the notes as authority for the same proposition. On page 2885 it is cited as authority in support of the statement that "it is undoubtedly true that a director may buy bonds at less than par if the transaction is *fair*, and if no stockholder objects."

Thompson in his treatise on Corporations cites the case twice. In Vol. 3 (2nd Ed.) Section 2241, the author says:

> "The execution and issuance of corporate

bonds must be a real and bona fide transaction. It cannot be a mere trick or device to evade the law, and to impose greater obligations upon the corporation than there is occasion for it to assume, and such issue of bonds must be to promote the legitimate corporate purposes. This does not necessarily imply that the bonds cannot be issued or sold for less than their face value. The issuance of stock and bonds has been sustained, under constitutional or statutory provisions prohibiting corporations from issuing stock or bonds except for money, labor done, or money or property actually received, where such bonds were disposed of for the best price that could be obtained, though for considerably less than their face value."

And by way of illustration the author says that bonds have been sold to directors at a discount of 25 per cent, and cites the Cobourg case in support of such statement. The same author again cites the case in Section 2285, as supporting the statement that "A purchaser was held entitled to protection where he obtained bonds from a director at 90c on the dollar, even where he was informed that the bonds were issued to the directors at 70c on the dollar."

In the Cobourg case the question of fraud did not enter into the case. The transaction involved was, under the circumstances of the case, fair and honest, and the question was simply whether under such circumstances a director who had purchased bonds

at a reasonable discount would stand on an equality with other debenture holders who had previously and before the circumstances changed bought similar debentures at a higher price. The case was decided in 1885, and in the thirty years intervening the law as to corporate management and as to the duties and responsibilities of directors has undergone many changes.

The case of Fisher v. McInerney, 137 Cal. 28, and the case of In re Regents Iron Works Company, 3 Chan. Div. 43, are so wholly beside the question that it is unnecessary to review them here.

Counsel has carefully avoided citing any case where the directors involved were guilty of unfair dealing or fraud or inequitable conduct of any kind. He argues around the question as to the duty and honesty required of corporate directors. He does not directly challenge the rule stated by the learned Trial Court, viz., "As directors, they were bound to subserve the interests of the company, and to hold its property for the common benefit of its creditors, and they were not privileged to strip it of its meager remaining resources for the purpose of recouping their private losses." (Trans. p. 141).

The Trial Court with the opportunity which it had of discovering the motives behind the actions of the Railway Syndicate had no difficulty in interpreting their actions, and its findings or conclusions as to the facts will not be lightly set aside by an appellate court.

Referring to the transaction in September, 1912, the Court says (Trans. p. 137):

> "At this time it is clear they (the Syndicate) had reached the conclusion that the Power Company was hopelessly insolvent, as was undoubtedly the case, and that their contract to purchase (second mortgage bonds) was ill-advised, and their original plan could not be profitably carried out."

Again referring to this agreement, the Court says (Trans. p. 139):

> "That under the circumstances such an agreement was thought by any one to be in the interest of the Power Company is wholly incredible. I cannot believe that an independent board of directors would have given to it a moment's consideration."

And again (Trans. p. 140) it says:

> "There is but one rational explanation of the agreement, and that is that the interests in control of the Railway Company, and, through it, of the Power Company, having concluded that the latter was hopelessly insolvent, and that a reorganization was inevitable and a receivership probable, resorted to this expedient for saving to themselves as much of the wreckage as possible."

In face of these positive and unqualified findings and conclusions as to the facts (and they are amply sustained by the record), it is useless to cite or re-

view authorities, as *amicus curiae* has done, bearing upon the right of directors to take security for advances fairly and honestly made by themselves in the interest of the company and its creditors and with no ulterior motives.

The attention of the court has been very urgently called in the brief of the Railway Company, as well as in that of the *amicus curiae* to the case of Atwood v. Shenandoah Railroad Company, 85 Va. 966, where a first mortgage provided for the issue of bonds up to $15,000.00 a mile upon a railroad, followed by a second mortgage authorizing issues up to a total of $25,000.00 a mile, and where a part of the bonds under the first mortgage which had not been sold were certified and delivered to the trustee under the second mortgage as additional security. This was one of the provisions of the second mortgage and the provisions of the first mortgage that bonds might be issued thereunder up to not to exceed $15,000.00 a mile were fully complied with. Upon foreclosure the holders of the first mortgage bonds which had been sold objected to the participation of the bonds under the first mortgage, which had been pledged to the trustee under the second mortgage. The line of road covered by the second mortgage was of greater extent than that covered by the first mortgage and it seems that the first mortgage bondholders sought to assert a lien over the entire line. The court seems to have been entirely justified in the statement that the claim was preposterous.

Counsel urges that this case not only illustrates

but is precisely analogous to the case at bar. Wherein this analogy resides it is difficult to say. Counsel says (p. 118) "Had these 718 bonds been delivered to the trustee under the Power Company's second mortgage the situation of the two cases would be absolutely identical." But how does that suggestion assist the court in this case? It supposes an utterly different situation. The 718 bonds were not delivered to the trustee under the second mortgage nor were there any provisions under either the first mortgage or the second that any such thing might be done. The first mortgage provides upon what terms and for what uses bonds may be certified and delivered under it. No one disputes that the 718 bonds might have been sold by the Power Company in good faith in the course of business and the proceeds applied to the corporate purposes. The missing cog in all these oft repeated arguments in these lengthy briefs is that they persistently ignore the essential distinction between a transaction had in good faith by a board of directors exercising their honest judgment in handling the affairs of the company and a transaction which it is "inconceivable any independent board of directors would have for a moment considered", entered into for the exclusive benefit of the directors themselves and constituting one of a series of acts that it is absolutely impossible to regard as conceived and carried out except with a fraudulent purpose and with a fraudulent intent.

With respect to the suggestion that the directors

would have neither moral or legal right to have offered the first mortgage bonds to the public without a full statement of the company's condition and that with such a statement they could not have been sold, we wish the court to distinguish between the undoubted insolvency of the Power Company and the equally undoubted insolvency of the Railway Company and the solvency and financial resources of the syndicate. No one doubts that the syndicate could have supported one or the other, or both of these companies for an indefinite time if it had desired to do so. The Power Company was, to be sure, insolvent on September 25, 1912, but whether it should suffer the consequences of that insolvency depended wholly upon the will of the Railway Syndicate. The ability, therefore, of the Railway Company to loan the Power Company $250,000.00 is no evidence whatever of the solvency of the Railway Company. The Railway Company was rotten to the core and its property was worth but a small fraction of the face of its bonds; *but its bonds were all held by the Syndicate.* It would collapse the moment the Syndicate ceased to feed money into its hopper but not until then. It would collapse as soon as it was known it could not carry out the schemes to appropriate the property of the Power Company. A receiver was appointed for the Idaho-Oregon and with that appointment the scheme of the Railway Syndicate for the immediate acquisition of the property and revenues of the Power Company was doomed. The Railway Company went into the hands of a receiver thirteen

days after the appointment of the receiver for the Power Company.

In these arguments we were leading to the reflection that whether the first mortgage bonds of the Power Company were salable or might properly have been sold to the public in the fall of 912 depended solely upon the will of the Railway Syndicate. The Railway Syndicate had it in its power to make the bonds absolutely good. If they had gone on and completed the Ox Bow, made the company independent of the Railway Company as to a supply of power, declared their intention to treat their second mortgage bonds as being subordinate to the first mortgage bonds until the Power Company's revenues had increased, and to continue to pay the interest on the first mortgage bonds out of this revenue, (and they were ample for that purpose) the first mortgage bonds themselves were and would have been perfectly good. Therefore whether it was both possible and honorable to sell the 718 bonds to the public at a good price depended solely upon the will and purposes of the syndicate. They had for nearly two years used the Railway Company as a competitor of the Power Company and for the purpose of depreciating its revenues and the value of its property to the end that when the Power Company was completely linked and subordinated to the Railway Company a consolidation could be readily effected.

We have adverted to the theory that the 718 bonds were the "property" of the corporation and that their certification constituted "issue" thereof. Coun-

sel seriously urges that the 718 bonds if they had not been delivered to the Railway Company would have been in the treasury of the Power Company and they would have been the "property" of the Power Company and entitled to share in the distribution at the foreclosure sale; and by some method of reasoning which we can not follow, the conclusion is arrived at that the situation of the parties would then have been the same as it is with the 718 bonds in the possession of the Railway Company. We unhesitatingly characterize as absurd the proposition that the unissued and undelivered notes of a corporation shall be issued in case of insolvency and foreclosure so as to swell the mortgage debt and allow the insolvent mortgage debtor to share in the proceeds of the sale of its own property. If the 718 bonds are in the possession of the maker thereof and have never been delivered for value, they are simply pieces of paper and represent nothing. If, however, this novel theory should be adopted, counsel is reminded that the mortgage to the State Bank covers all the property of the Power Company of every kind and description, existing at the time of the mortgage and thereafter acquired, and that therefore if the 718 bonds were the "property" of the Power Company they would be covered by the mortgage and the distributive share thereof would be a part of the property to be sold under the mortgage. And so we have the *reductio ad absurdum* to be expected from the application of such a theory.

The only case cited by counsel to support the the-

ory that the 718 bonds should share in the proceeds of the sale is the United Box Board case in a *nisi prius* court in New York city which counsel explains has been reversed. We have not the report of the case before us at the moment but if there is any validity in the reasoning by which it was concluded that the $16,000.00 of bonds in the treasury of the company were entitled to participate in the proceeds of the sale, that validity must manifestly depend upon some special situation which requires such a finding in order to do equity. It does not appear that the court of appeals approved the theory that the $16,000.00 of bonds were entitled to participate.

VI.

We do not wish to add to what we have said in our former brief with respect to the allowance by the court of $110,000.00 to the Railway Company and the claim of the Railway Company that it should have been allowed $250,000.00. In our principal brief we refer to and quote from the record showing, as we believe conclusively, that the Railway Company had succeeded to all the rights of the "bankers" under the original Syndicate agreement of September, 1911, and had concurrently assumed the obligations of the bankers. Naturally the transactions between the Syndicate and its creature the Railway, are for the most part known only to them, but the record shows that a few days after the meeting of September 25th a formal writing was executed between the bankers and the Railway Company evidently for the purpose not of creating any new rela-

tions but of reducing to writing an existing and well understood status, and reference to an earlier agreement made in April, 1912, helps to show that the various writings between the parties did not create relations but recognized and reduced to writing existing relations. What we do know absolutely is that the Railway Company became the owner of the Idaho-Oregon second mortgage bonds as fast as they were acquired by the bankers, and issued its own bonds against them, par for par, which bonds issued by the Railway Company were not issued to Kissel-Kinnicutt & Company but to the Syndicate.

It is absurd to suppose that Kissel-Kinnicutt & Company was standing in the breach and buying Power Company's bonds and remaining under continued obligations to buy more and turning over all the proceeds of the transaction to someone else without a corresponding obligation being assumed by the other party. This whole argument is evidently a mere evasion. It was not made in the Trial Court and is resorted to here in the hope of escaping through a crack. The court will have no difficulty in concluding that Kissel-Kinnicutt did not in September, 1911, contract for themselves, but contracted for a Syndicate which unquestionably had a Syndicate agreement already in existence under which all the money needed was not paid in by Kissel-Kinnicutt but by the syndicate; that the Railway Company was organized to take and own, and did take and own, all the property of every kind acquired by the uses of the Syndicate, issuing therefor its bonds to

the Syndicate and donating or issuing its stock in round millions to evidence the prospective rake-off. The Syndicate in turn doubtless financed its requirements, not by going into the individual pockets of its members but by taking the Railway bonds and hypothecating them with the related, interested, and associated bankers. It is a beautiful little scheme whereby the public furnishes the money and the exploiter takes the profits.

There is no analogy between the case at bar and the cases cited by counsel in the latter part of his brief, and the cases there cited are not authority for releasing the bankers or any purchaser of bonds from a contract to take an issue of bonds at a certain price, simply because after they have taken about 90 per cent of the issue they have concluded the contract was unwise and the bonds were not as good as they supposed at the time the contract was entered into. The doctrine of stoppage *in transitu* has no application to contracts of this kind. If it had, nearly all contracts for the purchase of bonds could be rescinded by the bond house before they are completed. For there is rarely a case, where, if the financing contract be broken, the partially constructed works will sell for sufficient to pay the bonds that have been issued and sold.

In the case at bar the bankers expressly recognized their obligation to pay the remaining $140,-000.00 (Trans. Exhibit "A", p. 112). The transactions releasing the Railway Company and the bankers from the obligation of paying the $140,000.00

and the loan of $250,000.00, and the exchange of second mortgage bonds for first mortgage bonds, were all contemporaneous, and constitute in fact and in law but one transaction. They were an important part of a fraudulent scheme to wreck the Power Company for the benefit of the Railway Syndicate; and we again submit that the only error committed by the Trial Court was in holding that the Railway Company was entitled to hold the bonds, of which it thus fraudulently obtained possession, as security for the $110,000.00 which it advanced the Power Company under the illegal acts referred to.

We respectfully submit that the decision of the Trial Court on this feature of the case should have been that the Railway Company having through improper and fraudulent motives and illegal acts obtained possession of the first mortgage bonds, it should in no wise profit by any of its acts, but should return the bonds to the Power Company; and if this places it in a position where it has not sufficient security for the $110,000.00 it has no one to blame but itself. It is in no worse position than many other creditors who have honestly and through proper motives advanced money or extended credit to the Power Company. Such rule would be conducive to honest corporate management, and it is sustained by sound public policy and well recognized principles frequently applied to participants in fraudulent transactions.

The conclusions reached by the learned District Judge as to the fraudulent character of the transac-

tions in question are amply sustained by the record. Through his intimate knowledge of the entire situation, because of the many phases of this controversy that have been before him, he was in a position to fairly construe the acts and the motives of the parties.

This is peculiarly a case for the application of the rule that when the trial court has considered conflicting evidence and made a finding or decree, it is presumptively correct and will be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious and important mistake appears to have been made in the consideration of the evidence.

Snider v. Dobson, 21 C. C. A. 76, 74 Fed. 758.

McKinley v. Williams, 20 C. C. A. 312, 74 Fed. 94, 102.

Gage v. Smyth Merc. Co., 87 C. C. A. 377, 160 Fed. 425.

Coder v. Arts, 82 C. C. A. 91, 152 Fed. 943.

McDonald v. Campbell, 81 C. C. A. 101, 151 Fed. 743.

Barton v. Texas Produce Co., 69 C. C. A. 181, 136 Fed. 355.

Hussey v. Richardson, etc. Co., 78 C. C. A. 370, 148 Fed. 598.

Stuart v. Hayden, 18 C. C. A. 618, 72 Fed. 408.

Paxson v. Brown, 10 C. C. A. 135, 61 Fed. 883.

Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664.

Davis v. Schwartz, 155 U. S. 631, 39 L. Ed. 289.

Kimberly v. Arms, 129 U. S. 512, 32 L. Ed. 764.

Hardin v. Union Trust Co., (C. C. A. 8th Circuit), 191 Fed. 152.

We realize that this discussion lacks connection and orderly sequence, but it has seemed impracticable to reply to the extended brief of the *amicus curiae* except by following it through and discussing *seriatim* such matters as seemed to require any reply from us.

We desire again to emphasize what we stated at the beginning, that counsel who appears as *amicus curiae* is in fact representing parties directly interested in the case, and his brief should therefore be read in the light of his partizanship and interest in the cause. We are also impressed with the fact that the authorities cited or quoted in the brief should be examined by the court, and not accepted at the value placed upon them by counsel, or as justifying the conclusions which he asserts.

It is important also that the decision and decree be considered as having been rendered after sale and upon distribution of the proceeds and upon application of the Railway Company to share equally with other bondholders in the proceeds of the sale, and as against objection thereto made by the intervening bondholders, and this was the stipulation in open court before the decree was signed (Trans. 163). When so viewed and when the record and the related

facts are all considered, we are impressed with the fact that appellants' conduct falls far short of bringing appellants within the rule so aptly stated by an eminent authority on Equity Jurisprudence: "*Nothing can call forth this court into activity but conscience, good faith and reasonable diligence.*"

Truly there can be no fear or apprehension under the record in this case that "too much conscience, if not too much learning," as suggested by *amicus curiae*, will make the members of the Railway Syndicate mad.

Respectfully submitted,

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